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No. 90-1390

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, *et al.*,
Respondents,

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Michigan

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BRIEF IN OPPOSITION FOR RESPONDENTS EVERT ROMEIN & ARTURO GONZALEZ

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

In 1980-1981, the Michigan Legislature passed statutes increasing workers' compensation benefits for workers iujured subsequently and permitting employers to offset other "employer financed" benefits against the workers' compensation benefits otherwise due and owing.

General Motors and Ford took the position that while these enactments did not increase the workers' compensation benefits payable to workers injured prior to 1982, the statutes did relieve the companies of the preexisting obligation to pay such workers the full amount of workers' compensation as originally established (by permitting the companies to make offsets for other "employer financed" benefits).

The companies' position in this regard was immediately—and with success—challenged administratively and in the lower state courts. Eventually, however, the Michican Supreme Court upheld the companies on statutory interpretation grounds; in so doing the Michigan Court agreed with General Motors that the adversely affected workers had no valid Contract Clause or Due Process Clause claim.

The 1987 Michigan Legislature responded by enacting a second—remedial and curative—statute requiring the companies to honor their workers' compensation benefits obligations incurred prior to 1982 according to the original terms.

The first question presented is

> whether the 1987 Michigan enactment violates the Constitution's Contract Clause.

The second question presented is

> whether the 1987 Michigan enactment violates the Due Process Clause.

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BRIEF IN OPPOSITION FOR RESPONDENTS EVERT ROMEIN & ARTURO GONZALEZ

The opinions below, the basis of this Court's jurisdiction, and the constitutional and statutory provisions involved are set out at pp. 1 and 88a-92a of the petition for a writ of *certiorari* and the appendix thereto (hereinafter "Pet. ——" and "Pet. App. ——").

COUNTERSTATEMENT OF THE CASE

In this case, the Michigan Supreme Court upheld the constitutionality of a remedial and curative 1987 Michigan statute *restoring* the workers' compensation benefits of workers injured before 1982 to the levels that had obtained when those workers were originally awarded benefits; the original benefits had been reduced by certain employers who relied on a controversial reading of a 1981 amendment to the Michigan workers' compensation law and whose position was, after extensive litigation, upheld in a 1985 Michigan Supreme Court decision.

1. The 1981 Act

Respondent Evert Romein, in the course of his employment with General Motors Corporation, suffered disabling pelvic and hip injuries in a fall on December 5, 1977. General Motors did not dispute its liability under the Michigan workers' compensation law, and the company therefore commenced and continued statutorily required benefit payments to Mr. Romein in the amount of $99.00 per week.

Respondent Arturo Gonzalez, in the course of his employment with Ford Motor Company, contracted a disabling lung condition as a consequence of work-related foundry exposure. In September of 1981, Ford agreed to pay—and commenced payment of—workers' compensation benefits to Mr. Gonzalez in the amount of $176.00 per week.[1]

Under the Michigan law applicable at the time, General Motors' and Ford's obligation to make workers' compensation benefit payments to Messrs. Romein and Gonzalez in the amounts just stated was not limited by any employer right to reduce the agreed-on payment to take account of the injured workers' receipt of other employer-financed benefits payments.

After Messrs. Romein and Gonzalez began receiving the workers' compensation benefits just stated, the Michigan Legislature enacted a package of amendments to the State's compensation law. Insofar as relevant here, these amendments provided (1) a prospective improvement in the workers' compensation benefit rate for workers injured on or after January 1, 1982;[2] and (2) an employer right to reduce the amount paid in workers' com-

[1] Michigan's Silicosis, Dust Disease and Logging Industry Compensation Fund was obligated to reimburse Ford for all weekly benefits paid in excess of an aggregate $12,500.

[2] 1980 PA 357, § 1; MCL 418.351; MSA 17.237(351); MCL 418.355; MSA 17.237(355). (The "1980 Act".)

pensation to take account of (to "coordinate") certain other "employer-financed" benefits.[3] The 1980-81 legislative package did *not* provide the workers' compensation benefits payable to workers—such as Messrs. Romein and Gonzalez—injured before January 1, 1982.[4]

Nevertheless, General Motors and Ford, virtually alone among Michigan employers, contended that by reason of the 1981 Act, the workers' compensation benefits payable to workers who were injured prior to 1982 and who did *not* share in the 1982 improvements in benefit rates—were as subject to deduction of "employer-financed" benefits ("coordination") as were the workers' compensation benefits of those who did share in those improvements.

On this basis, General Motors and Ford unilaterally reduced the benefits of Messrs. Romein and Gonzalez and of other similarly situated workers, often to *zero*. In cases brought by these adversely-affected workers, the workers' compensation administrative agency consistently ruled against the employers. *See Chambers* v. *General Motors Corp.*, 1982 WCABO 751, lv den Mich. Ct. App. No. 67973 (April 25, 1983).[5]

[3] 1981 PA 203, effective March 31, 1982; MCL 418.354; MSA 17.237(354). (The "1981 Act".)

[4] Those injured prior to January 1, 1980 did receive a small state-financed—as opposed to employer-financed—supplement (MCL 418.352(8) (10); MSA 17.237(352)(8)(10); MCL 418.391; MSA 17.237(391).

[5] In September 1983, General Motors began retroactive "coordination" of Mr. Romein's workers' compensation benefits, based on his receipt of social security benefits and a pension. His workers' compensation benefits were reduced to *zero*. Romein filed a petition in November, 1983 with the Michigan Bureau of Worker's Compensation, objecting to the coordination. In June, 1984, an administrative law judge ordered that the payment of workers' compensation benefits be made without coordination.

In August, 1982, Ford "coordinated" Mr. Gonzalez' pension benefits against his workers' compensation benefits, reducing his workers' compensation benefits to *zero*. Gonzalez obtained a hearing before

In early 1982, the Michigan House and Senate each adopted a resolution declaring that the coordination of benefits provided for by the 1981 Act did *not* apply to workers injured before March 31, 1982, the effective date of the coordination provision.

As the Michigan Manufacturers Association acknowledged in its *amicus curiae* brief below (at p. 3):

> It was well known that the applicability of section 354 [of the 1981 Act] to claimants injured before March 31, 1982, was controversial. Those employers and carriers who began, prior to this court's [1985] decision in *Chambers*, to coordinate worker's compensation benefits with other employer-funded wage-replacement sources did so at their peril, and in the knowledge that litigation over the statute's applicability was pending.

2. The Chambers Decision

Eventually the Michigan Supreme Court concluded, as a matter of statutory construction, that, because the Michigan Legislature had not expressly stated otherwise, the 1981 Act permitted coordination of workers' compensation benefits regardless of the date of injury. *See Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W. 2d 715 (1985), *reh. den.* 424 Mich. 1202, 389 N.W. 2d 685 (1985).[6]

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the Bureau of Worker's Compensation. In October, 1984, an administrative law judge held that Ford had "improperly coordinated and reduced [the worker's compensation] benefits due and owing plaintiff." A $1500 penalty was also assessed.

Both decisions were appealed to the Workers' Compensation Appeals Board, and decided as described *infra*.

[6] The Michigan Court ruled in *Chambers* that since the 1982 resolutions passed by the Legislature (referred to in the text above) were not embodied in a statute signed by the Governor, those resolutions were not binding expressions of legislative intent. 422 Mich. 636, 659; 375 N.W.2d 715, 725.

In the *Chambers* litigation, the Michigan Court rejected the claimants' argument that to apply the 1981 coordination legislation to workers injured before its effective date would violate their alleged vested rights under the Contracts and Due Process Clauses of the Constitution. In that case, General Motors—taking a position diametrically opposite to the one asserted here—contended that those clauses and principles were inapplicable. See the Appendix hereto setting out the pertinent portion of General Motors' Brief in *Chambers*.[7] The Michigan Supreme Court, agreeing with General Motors, held that "[w]orkers' compensation benefits are social welfare income-maintenance benefits," which the State Legislature is free to change at will. 422 Mich. at 654, 375 N.W. 2d at 722. "In providing for such benefits, the Legislature did not covenant not to amend the legislation." 422 Mich. at 654, 375 N.W. 2d at 723.

3. The Reaction to the Chambers Decision

The *Chambers* decision generated immediate and strong reaction. Former Michigan Governor William Milliken, the sponsor of the 1981 Act (who is quoted approvingly at p. 3 of the *certiorari* petition), disavowed the Michigan Supreme Court's conclusion:

> It was our purpose, as my remarks quoted in the opinion indicated, to apply the concept of coordination of benefits but only to those persons who would under the new legislation be receiving improved bene-

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[7] Citing *Lahti v. Fosterling*, 357 Mich. 578, 99 N.W.2d 490 (1959); *Selk v. Detroit Plastic Products*, 419 Mich. 1, 345 N.W.2d 184 (1984), and other Michigan Supreme Court precedents, General Motors contended that "'no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law'" and that "'that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." Brief, p. 21.

> fit rates against which any set-offs of other benefits might occur. *It was not our intent that the coordination apply in any way to persons who had suffered their injuries prior to the effective date of the amendments.*[8]

This and other expressions of surprise and dismay followed.[9] Although the Michigan Supreme Court subsequently denied a motion to rehear *Chambers*, 424 Mich. 1202, 389 N.W. 2d 685, Justice Boyle, author of the original opinion, dissented, noting the "harsh and unforeseen consequences" of the Court's decision, and stating "The incorrect methodology of our opinion leaves serious questions regarding the original decision in these cases," *id.*

4. The 1987 Act

Reaction to the Michigan Supreme Court's *Chambers* decision and to the decision's "harsh and unforeseen" consequences led to efforts for legislative relief. The State Legislature, with bipartisan—as well as business and labor—support, enacted, and the Governor approved, 1987 PA 28, immediately effective May 14, 1987 (the "1987 Act").[10] The 1987 Act—after declaring that "it having

[8] Letter to Theodore Sachs dated October 25, 1985, later published to the Michigan Supreme Court (emphasis supplied) and made part of the record below.

[9] Letter of James M. Brakora (Director of the Bureau of Worker's Disability at the time of the 1981 Act), Detroit Free Press, October 19, 1985; "Lawmakers contest court interpretation of worker's comp," Detroit Free Press, November 3, 1985; "Firms cut checks for disabled workers," Detroit Free Press, November 29, 1985; "Ruling on work disability pay stands," Detroit Free Press, December 31, 1985.

[10] Contrary to the statement in the *certiorari* petition that the 1987 Act resulted from a "changed economic and political environment, and with the sponsorship and support of organized labor" (p. 4), the Act was supported by both business and labor. Other amendments to the Act, including proposals favored by business, were also adopted. These included an amendment intended to mitigate the effect of the Michigan Court's then recent decision in *Beauchamp v. Dow Chemical Co.*, 427 Mich. 1, 398 N.W.2d 882 (1986), respecting the "intentional tort" exception to the exclusive-remedy provision of the Act. MCL 418.131; MSA 17.237(131).

> been and being the legislative intention not to coordinate payments . . . resulting from liability . . . for personal injuries occurring before March 31, 1982"—expressly prohibits the coordination of workers' compensation benefits for such injuries and requires refunds by employers and carriers of any coordination deductions that had been made. 1987 PA 28, § 345(17).

The then Director of the Bureau of Workers' Disability Compensation, Edward M. Welch, summarized the legislative history and purpose of the 1987 Act as follows:

> In 1982 the Legislature amended the law to provide that workers' compensation benefits would be reduced or "coordinated" for any other benefits which the worker received that were paid for by the employer. A dispute arose as to whether or not this applied to workers with dates of injury before the effective date of that law. In *Franks* v. *White Pine Copper Div.*, 422 Mich. 636 (1985) (frequently referred to as the *Chambers* case) the Supreme Court held that coordination did apply to all workers regardless of their injury date. Many people involved in the legislative process, including former Governor Milliken, expressed surprise at this decision and indicated that it had been their intention that coordination would apply only to workers injured after the effective date of the 1982 law.
>
> The new amendments to the Act correct this situation and make it clear that coordination only applies to workers injured after March 31, 1982. The amendments also call for a repayment to workers who have been coordinated in the meantime.[11]

[11] Michigan Department of Labor "LABORegister," June 1987, at 91.

5. The Post-1987 Act Litigation

General Motors and Ford subsequently contested the constitutionality of the 1987 Act in this and other litigation.[12] In so doing, General Motors and Ford argued, first, that the 1987 Act violated the *state* constitution's provisions concerning separation of powers in that the 1987 Legislature had improperly "overruled" the Michigan Supreme Court's 1985 *Chambers* decision; and, second, and contrary to General Motors' own prior position in the *Chambers* case, that the 1987 Act impaired the companies' vested rights, in purported violation of the Federal Constitution's Due Process and Contract Clauses.[13]

When the companies appealed to the Michigan Supreme Court, that court *unanimously* rejected their Con-

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[12] General Motors and Ford, together with the Michigan Mutual Insurance Company, sued Edward M. Welch, Director of the Bureau of Workers' Compensation, Frank J. Kelley, Attorney General, and John H. Chambers, appellee in the *Chambers* case, to challenge the constitutionality of the 1987 Act. Ingham Circuit Court No. 87-59051 CZ (Hon. Peter D. Houk). The trial court upheld the constitutionality of the Act and dismissed the suit. The plaintiffs subsequently appealed to the Michigan Court of Appeals, No. 104980, which has stayed proceedings pending decision in the instant case.

[13] In the *Romein* case, the Worker's Compensation Appeal Board, on May 20, 1987, reversed the decision of the administrative law judge and held for General Motors. Romein filed an application for leave to appeal to the Michigan Court of Appeals.

In the *Gonzalez* case, the Appeal Board, on May 27, 1987, relying on 1987 PA 28, affirmed the decision of the administrative law judge that Ford must make the payment of workers' compensation benefits without reliance upon original § 354(1). Ford filed an application for leave to appeal to the Michigan Court of Appeals.

By orders dated September 4, 1987, the Michigan Court of Appeals granted review and consolidated the cases. Then, on May 16, 1988, the Court of Appeals reversed *Romein* and affirmed *Gonzalez* upholding the constitutionality of the 1987 Act. 168 Mich. App. 444, 425 N.W.2d 174 (1988).

tract Clause arguments. Justices Riley and Griffin dissented on the *state law* claim that the 1987 Act violated separation-of-powers principles; and Justice Griffin dissented on the Companies' federal Due Process Clause claim in an opinion relating that claim however to the state, separation-of-powers ground.

ARGUMENT

This litigation concerns two inherently inequitable and unreasonable claims put forward by the petitioners:

First, that while the Contract Clause is not offended when the Michigan Legislature passes a law that is given effect by the state courts so as to release employers of contractual obligations to their employees previously and solemnly undertaken, that Clause stands as an impenetrable barrier to curative action by the Legislature that restores the contractual *status quo ante*—and does so by going no further than to hold the employers to the promises made in their original contracts.

Second, that the Due Process Clause bars the enactment of a curative statute responding to an unexpected, and, in the Michigan Legislature's view, incorrect, judicial construction of an earlier statute, where the remedial statute does nothing more than to require that those who had undertaken a financial obligation prior to the initial enactment and who—in the face of a strong counterclaim that the earlier statute had no such purpose—took the position that the enactment released them of that obligation, must honor their original undertaking.

Not surprisingly, the Michigan Supreme Court rejected the contention that the Constitution's Contract and Due Process Clauses can be put to such obviously improper uses. In so doing the Michigan Court carefully and faithfully followed the principles established by this Court and continuously applied to cases such as this one.

Plainly then this is *not* a case that warrants this Court's review.

I. THE CONTRACT CLAUSE CLAIM

1. The Contract Clause principle that governs here is established beyond peradventure of doubt. Indeed, as Justice Stewart stated in the Court's opinion in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978), the principle that "the Contract Clause does not operate to obliterate the police power of the States" is a "commonplace." That is so because

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. [438 U.S. at 241 quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905).]

The governing Contract Clause rules derived from this principle are both well-defined and clearly understood; those principles are deeply rooted in a long line of precedents that the Court synthesized and reaffirmed in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *Allied Structural Steel, supra*, and *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400 (1983). *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 502-506 (1987) (summarizing and following *Energy Reserves Group* and the Contract Clause precedents cited there).

In deciding this case, the Michigan Supreme Court correctly understood that "[t]o test for the valid accommodation of the Contract Clause and the state's police power, the United States Supreme Court has established a three-pronged test." Pet. App. 15a. In Part IIA of the opinion in *Energy Reserves Group*, Justice Blackmun—speaking for a unanimous Court—set out that test. The first prong of the *Energy Reserves Group* mode of analysis is so much of the essence here that we quote it at length in the margin.[14]

In this regard, it is very much to the point that, as Justice Powell (with whom Chief Justice Burger and (then) Justice Rehnquist joined) emphasized in his concurring *Energy Reserves Group* opinion, there is "no substantial impairment of [a party's] contractual rights" where that party's "reasonable expectations have not been impaired by the [state legislation in question]." 459 U.S. at 421. And the conclusion that the state legislation in question does *not* work a substantial impairment is "dispositive" of the claim of a Contract Clause violation. *Id.*

2. In the instant case, the Michigan Supreme Court held the alleged "impairment" of contract rights "cannot be deemed a substantial one." Pet. App. 15a. That holding represents a careful and faithful application of this Court's *Energy Reserves Group* test.

The Michigan Court noted first that "employers benefit from [the workers' compensation] scheme by obtaining a

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[14] The "threshold inquiry", said the Court, is

> "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.*, 438 U.S. at 244. *See United States Trust Co.* [*v. New Jersey*], 431 U.S. [1] at 17. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. *Allied Structural Steel Co.*, 438 U.S. at 245. . . . In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. *Allied Structural Steel Co.*, 438 U.S. at 242, n.13, citing *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic"). The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). [459 U.S. at 411.]

definite limit on their liability for workplace injuries. Since the impairment complained of in this case does not alter this basic benefit to the employer, it cannot be said to be substantial." Pet. App. 15a. The Michigan Court then added:

> The party to a contract who has entered into a highly regulated industry may not remove their contract from state restrictions merely by making a contract purportedly immune from legal limitation. *Energy Reserves Group, Inc., supra*, 459 U.S. at 411, 103 S.Ct. at 704, citing *Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908). The workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation. In this scheme the parties occupy a status that subjects them to certain retroactively imposed rights and liabilities. *Lahti*. The defendants knew that their rights were subject to alteration. In addition, the legislative resolution in early 1982 purporting to interpret § 354 put the defendants on notice that the Legislature might seek to prevent the coordination of benefits for pre-1982 injuries if efforts to achieve this result failed in the courts. Since the employer was aware of the likely alteration of the coordination of benefits provision, the impairment cannot be deemed substantial. [Pet. App. 15a-16a.]

If the Michigan Court is to be faulted in any respect, it is for giving the companies' arguments too much—not too little—credence. The Contract Clause claim made here is too paradoxical to be seriously entertained.

The 1977 "Romein-General Motors contract" and the 1981 "Gonzalez-Ford contract" each provide for the payment of a stated monthly workers' compensation benefit in addition to—and separate from—other "employer-financed" benefits.

Thereafter, the companies—*relying on a legislative enactment that become effective after these "contracts" were consummated*—impaired the "contracts" by reducing the agreed-upon payment to take account of certain other "employer-financed" benefits payable to Messrs. Romein and Gonzalez. The companies did so in the face of immediate legal challenges by the adversely affected employees, as well as actions by the Michigan Legislature and by the State Bureau of Workers' Compensation making it clear that the companies' aggressive use of the 1981 Act was legally questionable.

After the Michigan courts read the 1981 Act to authorize this impairment of these "contracts", the Michigan Legislature, in the 1987 Act, responded by making it crystal clear that the "contracts" are to be honored *according to their terms under the law as it stood at the time the "contracts" were negotiated and consummated and that contracting parties who sought to reap a windfall by dishonoring the "contracts" in the interim are to disgorge their improper gain.*

In *Allied Structural Steel*, the Court elaborated on the point of the Contract Clause by explaining: "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." 438 U.S. at 245. The 1987 Act cannot possibly be characterized as legislation that frustrates the companies' ordering of their business affairs by upsetting contract rights *on which the companies were entitled to rely.*

The salient point here, as thoughtfully explained in Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L.Rev. 692, 720 (1960), cited at Pet. 27, is that "an act which has the effect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in retroactively depriving a

person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose" (discussing numerous cases).[15]

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[15] Having correctly concluded that the 1987 Act did not substantially impair the companies' contractual rights, the Michigan Supreme Court need not have gone further. *See Energy Reserves Group*, 459 U.S. at 421 (Powell, J., concurring) quoted at p. 11, *supra*. But the Michigan Court also faithfully applied the second and third prongs of the *Energy Reserves Group* test, and held that the 1987 Act does not violate the Contract Clause even assuming that the Act substantially impairs the companies' contractual rights.

The second and third prongs of the *Energy Reserves Group* test require that "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem;" and that the regulation make an "adjustment of 'the rights and responsibilities of contracting parties [based] upon reasonable conditions and of a character appropriate to the public purpose justifying [the legislation's] adoption.'" 459 U.S. at 411-12 (citing *United States Trust Co.*, 431 U.S. at 22; *Allied Structural Steel Co.*, 438 U.S. at 247, 249).

As to the second prong of the *Energy Reserves Group* test, the Michigan Supreme Court correctly determined that the State Legislature's decision furthered a substantial and legitimate public purpose: *viz.*, the elimination of the coordination of benefits among employees who were injured before 1982 "since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." Pet. App. 17a. And, as to the third prong, the Michigan Court correctly determined that the 1987 Act was a reasonable means to achieve this purpose "since the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Id.*

The Michigan Supreme Court's analysis accurately reflects this Court's admonition that

> the Contract Clause does not deprive the States of their "broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *United States Trust Co. v. New Jersey*, *supra* [431 U.S.] at 22. Thus . . . a workmen's compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision

3. In what is nothing more than a red herring, the *certiorari* petition begins with a lengthy dissertation on the proposition that the "Michigan Supreme Court's initial conclusion—that there is no constitutionally protected contractual interest at stake here—is in direct conflict with a substantial line of federal and state precedents recognizing that the Contract Clause governs retroactive statutory modifications in the workers' compensation area." Pet. 11.

In Part II of its opinion, the Michigan Supreme Court unanimously rejected the companies' Contract Clause claim here on *two independent grounds*. Subpart IIA of the opinion—set out in two brief paragraphs—holds "that benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause." Pet. App. 14a. In Subpart IIB—and after a full analysis—the Michigan Court "find[s] that 1987 P.A. 28 serves a legitimate state interest in protecting the benefits of disabled employees through reasonable means sufficient to survive a Contract Clause challenge." Pet. App. 17a.

This Court, of course, sits to review state court "judgments, not opinions." *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). And, since, as we have shown, the Michigan Supreme Court's independent holding that the 1987 Act meets the Contract Clause's requirements is unassailable, the *certiorari* petition's claim of a conflict in the lower courts on the applicability of the Clause to such legislation is of no avail. If there is such a conflict, and if the companies' position on how that conflict should be resolved were sustained, that would return matters to a consideration of their Contract Clause claim on the merits; and,

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for work-related injuries, *New York Central R. Co. v. White*, 243 U.S. 188 (1917). [*Exxon Corp. Eagerton*, 462 U.S. 176, 191 (1983) (footnote omitted).]

as the Michigan Court correctly concluded, that claim is entirely without merit.[16]

4. The *certiorari* petition's Contract Clause discussion concludes with the modest proposal that the Court "reconsider the direction that the Contract Clause cases

[16] We believe that at the *certiorari* stage, the point made in the text is dispositive. So that we are not misunderstood, however, we add that the petitioners' "conflict" argument rests on a false premise: *viz.*, that all state workers' compensation laws create implied contractual rights between employers and employees.

We are not aware of any iron rule that the state statutes providing for workers' compensation benefits by their nature create implied contractual rights between employers and employees, and the petitioners cite no source establishing such a rule. Moreover, the question whether a State's workers' compensation statutes create such contract rights would not be a question of federal law but, rather, a question of state law which each State is free to answer for itself.

Thus, for example, in *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237 (3d Cir. 1987), heavily relied on by petitioners, Pet. 11, the Third Circuit states that "contract terms *implied under state law* are protected by the Contract Clause;" and that workers' compensation laws are implied terms of employment contracts *in the Virgin Islands*. *Id.* at 1243-44 (emphasis supplied). Similarly, in the other cases that the petitioners cite for the proposition that workers' compensation laws create implied contractual rights, the state court is simply interpreting the State's laws.

Here, too, the Michigan Supreme Court made a determination based on state law and concluded that the Michigan workers' compensation scheme does *not* create implied contractual rights. Indeed, this is the Michigan Court's longstanding interpretation of the Michigan workers' compensation laws. *See, e.g., Chambers v. General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985); *Lahti v. Fosterling*, 357 Mich. 578, 99 N.W.2d 490 (1959). And, as the petitioners recognize, other courts have reached this conclusion after examination of their state's workers' compensation schemes. *See* Pet. 13.

All this being so, the petitioners have *not* demonstrated a conflict in the lower courts on any point of constitutional law. Whether a State's workers' compensation scheme should create only statutory rights—or such rights *and* implied contractual rights as well—is a matter of state law about which the states are free to differ.

have taken" in order to "restore the Clause to its proper place in the constitutional scheme." Pet. 21.

The petition is, to be sure, less than precise in setting the metes and bounds of that "proper place."[17] In particular, the petition provides only the airiest generalities regarding what this new Contract Clause jurisprudence would be and makes no effort whatsoever to show that this jurisprudence would require reversal of the decision below *in this case*.[18]

With all deference, we suggest that the foregoing is worlds away from a demonstration that the governing Contract Clause principles so thoroughly and so recently stated in the Court's decisions from *United States Trust* through *Keystone Bituminous Coal Assn.* require reconsideration. What this portion of the petition does underline—inadvertently, we are sure—is the woeful weakness of the petitioners' Contract Clause claim.

II. THE DUE PROCESS CLAUSE CLAIM

The Companies' Due Process Clause claim—that the 1987 Act's retroactive effect transgresses constitutional norms—is nothing but their Contract Clause claim rephrased. This Court has "contrasted the limitations im-

[17] We are told only that the Clause "was construed as a virtually absolute bar on retroactive impairments of contractual obligations", that *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934), "modified this approach" albeit only as "a limited departure", and that later cases have "expanded the exception". Pet. 21-22. This short history of the law is then supplemented by a 1965 dissenting opinion by Justice Black, a 1987 Seventh Circuit concurring opinion by Judges Posner and Easterbrook, and a single law review article of the same year as the "proof" that this Court's Contract Clause jurisprudence has gone astray. Pet. 22-23.

[18] This section of the petition ends with a clarion call to "reconsider" the "dichotomy" between "public and private contracts" and with regard to the latter, to require that "any impairment must be justified by a compelling state interest or, at a minimum, by a showing that it was 'essential to the achievement of an important state purpose.'" Pet. 23 (quoting *United States Trust*, 431 U.S. at 32 (Burger, C.J., concurring)).

posed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses." *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 733 (1984). Against that background, it follows from what we have shown thus far that the Michigan Supreme Court's rejection of this Due Process Clause claim is entirely sound and we therefore make only two additional points.

1. Just as the governing Contract Clause law was clearly stated by a unanimous Court in *Energy Reserves Group, supra*, so the governing Due Process Clause law was clearly stated by a unanimous Court in *Pension Benefit Guaranty Corp.* The essence of the matter is that

> the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . .
>
> To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose. [467 U.S. 729, 730.]

See also United States v. Sperry, —— U.S. ——, 110 S.Ct. 387, 396 (1989) (unanimously reffirming the standard for review of retroactive legislation stated in *Pension Benefit Guaranty Corp.*).

2. The Michigan Supreme Court explained at length why the 1987 Act meets that deferential rationality standard. That court stated first:

> The justification for retrospective legislation must take into account the possibilities that the parties

> acted in reliance on current law and that they may have altered their conduct to reduce liability if they had anticipated the imposition of later liability.
>
> It is . . . unlikely that the defendants in this case would have altered their course of conduct and paid full benefits merely to avoid the potential liability from a later change in the law. The employers acted in their own best economic interests at the time. [Pet. App. 7a-8a.][19]

The Michigan Court added:

> The retroactive portions of the statute challenged here are justified by a rational legislative purpose to protect the benefit levels of workers who did not receive the increases in the legislative reform packages of 1980 and 1981. Since they did not receive the increase, remedial measures were needed. These amendments served a rational legislative purpose to alleviate this hardship. [Pet. App. 9a.]

It is equally to the point that the Michigan Court was

> not persuaded that the defendants' reliance on the coordination provisions was reasonable.
>
> The defendants cannot claim a reliance interest on rights created by the workers' compensation statute that are more deserving of constitutional protection than the reliance interest of the employers who incurred retroactive liabilities under the pension law upheld in *Pension Benefit Guaranty Corp., supra*, 467 U.S. at 727, 104 S.Ct. at 2716. In both instances, the employers were on notice of the legislative debate regarding the proposed changes in the law. Reliance on an area of law that is in a state of flux is not reasonable reliance. [Pet. App. 11a-12a.]

In short, as we have already emphasized, General Motors and Ford sought to take advantage of a drafting defect in a statutory enactment to relieve themselves of a *pre-existing* financial obligation. The companies, more-

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[19] *Cf. United States v. Sperry, supra*, 110 S.Ct. at 396 ("It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them").

over, did so in the face of an immediate litigation challenge and a contemporaneous legislative statement that their reading of the statute was wrong. After the protracted litigation that ensued eventuated in a decision that the Michigan Legislature determined was contrary to its original intent and to a proper distribution of the benefits and burdens of economic life, the Legislature took action limited to assuring that the companies did not enjoy a windfall and that the workers injured before the 1981 Act became effective received the amount of workers' compensation benefits those workers had been promised at the time of their injury.[20]

The companies' Due Process Clause argument begins from the proposition that the Michigan Supreme Court "failed to give effect to this Court's repeated admonition that the Due Process Clause is particularly concerned with retroactive enactments that disturb past transactions and reasonable expectations." Pet. 24. The foregoing, we submit, is more than sufficient to demonstrate that the 1987 Michigan Legislature acted properly precisely because neither General Motors nor Ford had any basis for a "reasonable expectation" that the 1981 Act completely and finally wiped away the workers' compensation benefit obligations the companies had previously incurred.[21]

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[20] The petitioners' repeated invocations of *McKesson v. Div. of Alcoholic Beverages & Tobacco*, —— U.S. ——, 110 S.Ct. 2238 (1990), Pet. 26, 28, are puzzling to say the least. In *McKesson*, this Court all but suggests that Florida cure the unlawful discriminatory effect of a tax by "assess[ing] and collect[ing] back taxes from petitioner's competitors who benefitted from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." 110 S.Ct. at 2252.

[21] Citing cases involving the retroactive imposition of tax liability—an area that is *sui generis*—the petitioners argue that while the statutory imposition of some period of retroactivity might not offend the Due Process Clause, five years of retroactivity is unlawful. Pet. 24, 28-30. This contention is baseless.

Even when retroactive liability for taxes is imposed, this Court has not adopted a temporal limit on retroactivity. Instead, the Court has said, "beyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation,' *depending on 'the nature of the tax and the circumstances in which it is laid.'*" *McKesson v. Div. of Alcoholic Beverages & Tobacco, supra*, 110 S.Ct. at 2252 n.23 (1989) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)) (emphasis supplied). We have already shown that, under the circumstances presented here, the imposition upon the petitioners of remedial liability to workers injured before 1982, far from being "harsh" or "oppressive", was entirely foreseeable and is eminently just.

This same inquiry, involving a consideration of all the facts and circumstances, is also appropriate outside the taxation area. Thus, for example, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-20 (1976), this Court approved the statutory imposition upon employers of retroactive liability for the effects of deaths and disabilities of miners who left employment in the industry before the effective date of the Act; as the Michigan Supreme Court noted, *Turner Elkhorn* did so despite the fact that "liability for past, completed transactions was altered," Pet. App. 11a.

Similarly, Due Process challenges to the constitutionality of the Portal to Portal Act of 1947, enacted *nine years* after the Fair Labor Standards Act, were uniformly rejected despite the fact that the 1947 statute retroactively "obliterated causes of action for overtime pay, liquidated damages and counsel fees, which had accrued under the Fair Labor Standards Act previous to the enactment of the Portal to Portal Act." *Darr v. Mutual Life Insurance Co.*, 169 F.2d 262, 266 (2d Cir. 1948).

CONCLUSION

For the above-stated reasons, the petition for a writ of *certiorari* should be denied.

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APPENDIX

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Point III of the Argument In the Brief For General Motors To The Michigan Supreme Court In *Chambers v. General Motors Corp.*, decided *sub nom. Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W.2d 715 (1985), *reh. den.* 424 Mich 1202, 389 N.W. 2d 685 (1985).

III.

Section 354 does not deprive any person of a vested or contractual right.

The Board also erred by concluding that application of § 354 would violate rules of statutory construction which prohibit retrospective application of statutes to take away or impair vested rights. App, pp 34a-36a. The Board's conclusion in that respect erroneously assumes that there exists a vested right to worker's compensation benefits. *Lahti* v *Fosterling*, 357 Mich 578 (1959), teaches otherwise.

In *Lahti* this Court was confronted with a claim by the plaintiff for additional medical benefits based upon an amendment to the Act which became effective after his injury. The statute in force on the date of plaintiff's injury required the employer to pay the expense of hospitalization and medical care for a maximum of four 6 month periods from the date of injury. Subsequent to the plaintiff's injury, the Act was amended to give the Bureau discretion to order unlimited additional 6 month periods of medical and hospital care to be paid by the employer. The employer contended that the right to compensation vested at the time the employee's cause of action accrued because the right to compensation arose out of an employment contract and that subsequent amendments could not modify the employee's rights or the employer's obligations.

However, this Court in *Lahti* rejected the defendant's argument and held that:

> "* * * no vested right or contractual right exists that prohibits the legislature from making a change in the remedies afforded employees under the workmen's compensation law * * *." 357 Mich 578, 595.

The basis for this conclusion is that worker's compensation remedies exist as a matter of legislative grace and:

> "* * * that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." 357 Mich 578, 589.

Those principles, as enunciated in *Lahti*, were recently reaffirmed in *Selk*, *supra*. In *Selk*, as in *Lahti*, the employers argued that "'since the workmen's compensation act is statutory, and since the employment is based upon a contract, for the legislature to change the remedies would be a violation of the rights of the parties and the contract'." 419 Mich 1, 11. As in *Lahti*, the court in *Selk* rejected that conclusion, citing *Lahti* and *McAvoy* v *H. B. Sherman Co.*, 401 Mich 419 (1977):

> "'"* * * But we cannot say that such contractual relationship or liability necessarily precludes a subsequent Legislature from effecting changes in the Workmen's Compensation laws. Those who enter into such contractual relationships do so with knowledge of the right and power of the Legislature to enact any new law relating to the subject matter, not in conflict with any constitutional provision, and must be presumed to have agreed to any such change."'" *Lahti*, 357 Mich 578, 594-595, quoted in *Selk*, 419 Mich 1, 12.

* * *

> "* * * 'remedies for the enforcement of a contract may be modified without violating the impairment of contract clauses'." *McAvoy*, 401 Mich 419, 457, quoted in Selk, 419 Mich 1, 12.

After discussing *Lahti* and *McAvoy*, this Court in *Selk* concluded:

> "* * * The state may, however, alter the terms of a private contract *to either lighten or increase obligations*, save where its activities constitute a substantial alteration of the terms of a contract. In the latter event, the alteration is permissible if the legislation is necessary to meet a broad and pressing social need and is reasonably related to that goal. *Allied Structural Steel Co* v *Spannaus*, 438 US 234; 98 S Ct 2716; 57 L Ed 2d 727 (1978)." 419 Mich 1, 13. Emphasis added.

Here, the obligation of an employer remains to provide payments which equal the amount of worker's compensation awarded to the employee. What is changed is the sources from which the obligation may be met. See *Alessi*, *supra*, p 7, footnote. If the employee is receiving no pension or other employer-financed benefits, the entire obligation must be met out of worker's compensation funds provided by the employer through either self-insurance or commercial insurance. Insofar as other employer-financed benefits are available, they may be used to meet the obligation.

Should such employer-financed benefits cease, then the employer again must meet the full obligation from its own or its insurer's resources. By that means, the Legislature has insured that an injured employee always will receive that level of compensation which the Legislature has determined is necessary during the continuance of disability. Thus, if an employee's worker's compensation were coordinated because of receipt of social security benefits or a pension, he or she still would continue to re-

ceive at least the level of income the Legislature has determined is appropriate. Should social security payments diminish or cease, the employer still would have to provide payments sufficient to meet the level of worker's compensation established by statute. The same would hold true if for some reason the assets of a pension plan became insufficient to meet pension obligations.

Moreover, even if there were a substantial alteration of plaintiff's right to receive a specified sum as the result of injury, which is not the case, *Selk* observes that such an alternation would be appropriate to remedy a serious social problem in the field of worker's compensation when the legislative solution is reasonably related to that problem. Like § 801, which was part of the reform package and the validity of which was recognized in *Selk*, § 354 also was part of the legislative solution to a perceived problem. The wisdom of that solution:

> "'* * * is, in any event, a matter confined to the exclusive judgment of the Legislature. * * *'" 419 Mich 1, 14.

Having determined that application of a 12% interest rate to payments accruing and relating to injuries occurring before the effective date of § 801 did not impair the obligation of contracts, this Court in *Selk* rejected the claim that to do so was violative of substantive due process:

> "Having found that the statute is reasonably related to a legitimate state interest for purposes of the impairment of contract claim, we conclude that defendants' due process claim is likewise without merit. In *Lahti* v *Fosterling, supra*, 357 Mich 591-592, we quoted from *Matter of Hogan* v *Lawlor & Cavanaugh Co*, 286 App Div 600; 146 NYS2d 119 (1955), in holding:
>
> > "'"The due process clause of the State and Federal Constitutions does not freeze the burden of

> > compensation liability as of the date of the occurrence of an industrial accident, beyond the power of legislative change. In carrying out its social purpose, the Legislature has the power to increase the burden on the employer for disability or expenses occurring or continuing after the date of the enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time."'" 419 Mich 1, 14-15.

As the Court earlier noted in *Selk*, quoted *supra*, p 22, the State may by amendment either "lighten or increase" obligations and, as the language just quoted establishes, that may be done "even though the accident which gave rise to the disability or expenses had occurred prior to [enactment of the amendment]." Under § 354, the employer's obligation was unchanged, only the method of fulfilling it having been modified, but even if it were otherwise, *Selk* establishes that the result would be permissible.

A similar situation was presented in *In re: Certified Questions, Karl* v *Bryant Air Conditioning Co.*, 416 Mich 558 (1982), in which the application of the comparative negligence statute to a plaintiff whose cause of action had accrued and whose case was pending prior to enactment of the statute "reduced plaintiff's damages by the corresponding amount that plaintiff was negligent, which was 95% of the total." 416 Mich 558, 562. The Court in *Karl* explained why this very significant alteration in the amount of plaintiff's recovery was not an impermissible result:

> "Comparison of 'rule three cases' [which involve 'vested' rights] to the instant case indicates that application of the products liability statute did not trigger the proscription found in rule three. First, the statute did not interfere with plaintiff's 'contractual cause of action' since an implied warranty

action for personal injuries caused by a defective product is different from an express contract. Second, this rule is also triggered when a plaintiff's accrued cause of action would be totally barred or taken away by a new act. While the total damages which plaintiff could have received were significantly reduced by § 2949, plaintiff's cause of action was not legally barred or taken away.

"Section 2949 does not bar any claim, legal or equitable, but it states that 'damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.' See, also, *Li* v *Yellow Cab Co of California*, 13 Cal 3d 804, 828-829; 119 Cal Rptr 858, 875; 532 P2d 1226, 1243 (1975). Section 2949 is not a legal bar, but is a principle established by the Legislature which mitigates damages in products liability actions." 416 Mich 558, 577.

As in *Karl*, so here, plaintiff's right is not "barred or taken away"; instead, worker's compensation benefits paid directly to the worker may be diminished, but only for so long as and to the extent that other payments financed by the employer are received by the worker.